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IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,
Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held—in conformance with this Court's precedents—that a snowmaking plan that would "diminish the sacredness" of government land in the view of certain Indian tribes imposed no substantial burden on those tribes' religious exercise.

RULE 29.6 STATEMENT

Respondent the Arizona Snowbowl Resort Limited Partnership states that it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

This case presents the question whether a federal government land-use decision that would "spiritually contaminate[ ]" a mountain and thus "injure[ ] [the] religious sensibilities" of certain Native American tribes amounts to a substantial burden on those tribes' religious exercise.[1] Pet. App. 5a-6a. This Court resolved that question, on indistinguishable facts, more than 20 years ago. *See Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-

[1] For purposes of recusal, counsel for respondent states that Hogan & Hartson LLP began representing respondent in this matter on May 7, 2007.

444 (1988) (government land-use decision that would "seriously damage the salient * * * qualities" of land sacred to tribes, and thus cause severe adverse effects on tribes' "belief systems," did not constitute cognizable burden on religion). Faithfully applying *Lyng* and other of this Court's precedents to the facts of this case, the *en banc* Ninth Circuit held that the petitioner tribes' asserted harm to their belief systems could not constitute a substantial burden on their religious exercise in the absence of some governmental coercion or penalty. Pet. App. 7a, 20a. This Court should not invoke its certiorari power to review a decision that followed its teachings to the letter.

Petitioners make no attempt to distinguish this case from *Lyng*. Instead, they assert that *Lyng* is inapplicable because it arose under the First Amendment's Free Exercise Clause while this case arises under the Religious Freedom Restoration Act ("RFRA"). But that argument runs up against the fact—universally acknowledged in the courts of appeals—that Congress enacted RFRA precisely to revive the standards applied in this Court's pre-1990 Free Exercise jurisprudence, including *Lyng* and its progenitors. *See infra* at 13-14. The codification of a legal standard into a new statute does not give petitioners license to relitigate a case this Court has already decided.

Nor are the circuits divided as to the definition of "substantial burden." Petitioners attempt to manufacture a circuit split by quoting certain circuits' substantial burden formulations and noting that some of their words differ. But even a cursory analysis of those decisions makes clear that they are

reconcilable: All require governmental coercion of an adherent's religious conduct before a "substantial burden" may be found, and all articulate that requirement in similar ways. Those commonalities should not be surprising, given that all base their formulations on the same Supreme Court decisions that guided the analysis in *Lyng*. And in any event, "an inconsistency in dicta" does not a circuit split make; for a true conflict to exist, "there must be a real or 'intolerable' conflict on the same matter of law or fact." *See* R. Stern *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) ("*Stern & Gressman*"). No such conflict exists here. The "semantic differences" among the circuits' dicta have not been outcome-determinative; they are merely "minor variations" that stem from the circuits' "reword[ing]" of this Court's holdings. *Washington* v. *Klem*, 497 F.3d 272, 279 (3d Cir. 2007).

The Ninth Circuit's decision does not conflict with—indeed, follows inevitably from—this Court's cases, and there is no circuit split. The factors warranting certiorari review are absent. The petition should be denied.

COUNTERSTATEMENT

1. The San Francisco Peaks, a group of four mountains in northern Arizona, are located on federal land within the Coconino National Forest. Pet. App. 187a-188a. The federal government has for decades managed the Peaks to facilitate a variety of economic and leisure activities on the mountains, including livestock grazing, timber harvesting, mining, and camping. *Id.* 216a-218a.

The Arizona Snowbowl ski resort ("Snowbowl") occupies approximately one percent of the Peaks' 74,000-acre expanse. *Id.* 216a. The Snowbowl sits on the Peaks' western flank and has been used as a ski area, under a Forest Service permit, since at least 1938. It is one of two major downhill ski facilities in Arizona, and it serves the growing population of Phoenix; as the District Court found, it is "an important public recreational resource." *Id.* 216a-218a. The Snowbowl also provides substantial economic benefits, including hundreds of jobs, to the local community. SER0700-02, 1471-73.

2. The Snowbowl has long been the subject of litigation by certain Native American tribes, who believe that the Peaks have "cultural and religious significance." Pet. App. 215a-216a. In 1979, for example, the Forest Service approved upgrades to the Snowbowl, including new trails and facilities. *Id.* 188a. Several tribes challenged the approval on Free Exercise grounds, arguing that "development of the Peaks would be a profane act, and an affront to the deities" and that "the Peaks would lose their healing power and otherwise cease to benefit the tribes." *Wilson* v. *Block*, 708 F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). The D.C. Circuit rejected the tribes' arguments, holding that the adverse effects the tribes described did not amount to a "substantial burden." The *Wilson* court accepted that the proposed upgrades to the Snowbowl would cause the tribes "spiritual disquiet" but explained that that did not suffice to trigger strict scrutiny: "Many government actions may offend religious believers * * *, but unless such actions penalize faith, they do not burden religion." *Id.* at 741-742.

The Snowbowl has been operating ever since under the plan approved in *Wilson*. Pet. App. 189a. And despite their representations in *Wilson* about the effect the Snowbowl upgrades would have on their religious practices, the tribes have continued to use the Peaks as before; as the District Court found, "[t]ribal beliefs, ceremonies, and practices have not changed." *Id.* 218a, 226a.

3. The Snowbowl has experienced "highly variable snowfall" over the last several years, including lengthy periods in recent winters when there was not enough snow to support skiing. *Id.* 218a; SER1879. The variable snowfall has caused extreme fluctuations in skier visits and annual revenues. Pet. App. 218a-219a. Without snowmaking to supplement the area's natural snowfall, the Snowbowl will go out of business. Pet. App. 250a, 264a-265a.[2]

In 2002, the Snowbowl sought the Forest Service's approval to begin snowmaking—a practice employed at most major downhill ski areas, including those in other national forests, to ensure consistent ski seasons. Pet. App. 219a; SER1494-95, 1461. Because there is insufficient available surface or groundwater in the Flagstaff region to support snowmaking, the Snowbowl sought approval to use

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[2] *Amici* the National Congress of American Indians (NCAI) *et al.* maintain that "the record in this case makes clear" that skiing on the Peaks "would continue without artificial snowmaking." NCAI Br. 23. This assertion is counterfactual. The District Court found that "snowmaking is needed to maintain the viability of the Snowbowl," and the Forest Service found that a no-snowmaking alternative "would likely lead to the loss of the Snowbowl facility." Pet. App. 264a-265a.

Class A+ recycled wastewater, or "reclaimed water." Pet. App. 189a.

Class A+ water is the highest grade of reclaimed water recognized under Arizona law. *Id.* 223a. It is cleansed and purified at a Flagstaff treatment facility that employs ultraviolet disinfection processes, chlorine, and other cleaning agents. The resulting water "must comply with extensive * * * monitoring requirements under three separate permit programs." *Id.* 224a. The Flagstaff facility's purification technology is so advanced that the City of Flagstaff uses the water on parks and school playgrounds, and Arizona regulations authorize Class A+ reclaimed water for "any type of direct reuse," including spraying on food crops and orchards. *E.g.*, SER1881, 1883; Ariz. Admin. Code § R18-11-303(D) & Tbl. A. Indeed, "[r]eclaimed water is used by many of the [petitioner] tribes" themselves—including for snowmaking on other land they consider sacred. Pet. App. 230a, 245a-246a.[3]

The petitioner tribes nonetheless disparagingly refer to reclaimed water as "sewage water," emphasizing that "Arizona regulations prohibit the use of recycled sewage water for human consumption" and certain "full-immersion water activity." Pet. 6-7 & n.2 (quotation marks and citation omitted). This high-rhetoric summary omits quite a few crucial facts, none more important than this one: The same regulation to which petitioners refer "specifically allows Class A+ reclaimed water—

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[3] Petitioner the White Mountain Apache Tribe, for instance, runs a ski resort on sacred land that "relies upon artificial snowmaking" using in part "reclaimed water." *Id.* 245a.

the class of water to be used at the Snowbowl—*for direct reuse in snowmaking*." Pet. App. 201a (emphasis added). Indeed, Class A+ reclaimed water is more thoroughly purified than Arizona law requires for this purpose. *See* Ariz. Admin. Code § R18-11-309 Tbl. A (specifying that reclaimed water of Class A and above may be used to make snow). The state's approval of high-grade reclaimed water for snowmaking and many other uses is unsurprising. The use of reclaimed water is a common, environmentally sound practice in Arizona and other Western states. SER0602, 1414, 1554a.

4. The Snowbowl's snowmaking proposal, which was included in a broader proposal to make other upgrades, received extensive review beginning in 2002. Even before it opened the proposal to full public comment, the Forest Service sought input from the tribes. Pet. App. 219a. All told, the Forest Service made more than 500 contacts with tribal members, held some fifty meetings with them, and considered more than 11,000 comments from tribes and other interested groups. *Id.* 219a-220a. The tribes, for their part, made clear that they objected on religious grounds not just to snowmaking with reclaimed water, but to snowmaking in general—and indeed to the Snowbowl's continued existence. The courts below found that the Havasupai petitioners consider snowmaking "profane"; that the Navajo petitioners' "official position is that the Snowbowl should be shut down completely"; and that the Hopis, White Mountain Apache, and Navajos "would oppose snowmaking at the Snowbowl even if the snow was made from fresh water." *Id.* 5a, 230a, 234a, 249a.

After reviewing these and other objections and considering at least a dozen alternative plans (including fresh-water snowmaking, no snowmaking, and closing the Snowbowl altogether), the Forest Service approved the reclaimed-water snowmaking plan in February 2005. *Id.* 220a-221a.

5. Petitioners filed suit in the District of Arizona. *Id.* 186a. The suit alleged that the Forest Service's approval of the Snowbowl project violated RFRA, other federal statutes, and the government's Indian trust responsibilities. *Id.* 190a-191a. The District Court rejected six of petitioners' seven claims on summary judgment. *Id.* 191a-214a. As to RFRA, however, the court decided that the issues were fact-intensive and set the matter for trial. *Id.* 215a.

After an eleven-day bench trial on the RFRA substantial-burden question, the court issued 222 findings of fact, *id.* 215a-255a, and entered judgment for the Forest Service and the Snowbowl. The court noted that while "RFRA provides no definition of 'substantial burden,'" Congress enacted RFRA with the expectation "'that the courts will look to free exercise cases decided prior to [*Employment Division* v. *Smith*, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened.'" *Id.* 256a (quoting S. Rep. No. 103-111 at 8-9 (1993)). These cases include *Lyng*. *Id.* After reviewing *Lyng* and the cases on which it relied, the court concluded that a government action "will not be a 'substantial burden' absent a showing that it coerces someone into violating his or her religious beliefs or penalizes his or her religious activity." *Id.* 257a.

The District Court found that the petitioners had "failed to demonstrate" that the Forest Service's snowmaking approval constituted any such coercion or penalty. *Id.* 259a. It found that the tribes would still have access to all of the Snowbowl for religious purposes; that the project "does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks"; and that the Forest Service's decision "does not coerce individuals into acting contrary to their religious beliefs [or] penalize anyone for practicing his or her religion." *Id.* 259a-261a.

The District Court observed that the tribes had asserted—in "near identical" terms to those used by their predecessors in *Wilson*—that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would * * * cease to benefit the tribes." *Id.* 259a-260a (internal quotation omitted). But the court explained that these beliefs, "although sincerely held, are not sufficient for the proposed project to constitute a substantial burden under RFRA" absent a coercive effect on religious practices. *Id.* 260a-261a. The court also concluded in the alternative that the government had a compelling interest and had chosen the least restrictive means to accomplish its goals. *Id.* 261a-265a.

6. A Ninth Circuit panel reversed in part, finding that the artificial snowmaking plan violated RFRA and the National Environmental Policy Act. *Id.* 118a. Writing for the panel, Judge William Fletcher opined that *Lyng* was inapposite because "RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* free exercise cases." *Id.* 125a. This was so, according to

Judge Fletcher, in part because "RFRA goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.'" *Id.* (quotation marks and citation omitted). The panel concluded that the snowmaking plan imposed such a "burden" because it would "undermine" the tribes' belief systems. *Id.* 147a. The panel applied strict scrutiny and concluded (also contrary to the District Court) that the Snowbowl upgrade plan was not justified by a compelling governmental interest. *Id.* 154a.

The Forest Service and the Snowbowl sought rehearing, observing, among other things, that the panel's decision was in deep tension with *Lyng*. The Ninth Circuit agreed to rehear the case *en banc* and, by an 8-3 vote, reinstated the District Court's decision. Writing for the majority, Judge Bea explained that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden'—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the exercise of religion." Pet. App. 7a. On the contrary, under RFRA a burden is only cognizable if government coercion exists: "Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of religion." *Id.*

The *en banc* court explained that "Congress expressly instructed the courts to look to pre-*Smith*

Free Exercise Clause cases * * * to interpret RFRA," and therefore that "the cases that RFRA expressly adopted and restored * * * control the 'substantial burden' inquiry." Pet. App. 23a n.13, 18a (citing 42 U.S.C. § 2000bb(a)(5)). Reviewing those cases—including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Thomas* v. *Review Board of Indiana*, 450 U.S. 707 (1981)—the majority concluded that this Court has always required governmental coercion or penalty before it has found a "substantial burden" on religious exercise. *Id.* 19a-25a. *Lyng*, in particular, was "on point." *Id.* 22a. The majority observed that *Lyng* had rejected an indistinguishable burden argument by Indian tribes, precisely on the ground that no matter how serious the government project's effect might be on sacred land, the tribes were neither " 'coerced by the Government's action into violating their religious beliefs' " nor " 'penalize[d]' " for their "religious activity.' " *Id.* 23a-24a (quoting *Lyng*, 485 U.S. at 449). The *en banc* majority concluded:

> Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment. Even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will "virtually destroy the * * * Indians' ability to practice their religion," there is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks. [*Id.* 25a (quoting *Lyng*, 485 U.S. at 451)].

Judge Fletcher, the author of the panel opinion, dissented, joined by Judges Pregerson and Fisher. The dissent maintained that the majority's definition of "substantial burden" was more restrictive than pre-*Smith* case law warranted. *Id.* 58a-59a. The majority rejected this argument, observing that "the dissent cannot point to a single Supreme Court case where the Court found a substantial burden * * * outside the [coercion/penalty] framework. The reason is simple: There is none." *Id.* 31a. The dissent also suggested that the majority's definition of "substantial burden" was inconsistent with the dictionary definition of that term. *Id.* 55a. The majority rejected this argument too, explaining that in RFRA "Congress expressly * * * restored a body of Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion. * * * Thus, we must look to those cases in interpreting the meaning of 'substantial burden.'" *Id.* 29a-30a (citing 42 U.S.C. §§ 2000bb(a)(4)-(5); 2000bb(b)(1)).

The petitioners have sought certiorari. Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S SETTLED PRECEDENTS.

1. This Court's Free Exercise cases, including *Lyng*, squarely foreclose petitioners' claim. In *Lyng*, Native American tribes argued that a government land-use project burdened their religious exercise because the project impaired the sanctity of the land, making it difficult, if not impossible, for them to

practice their religion. 485 U.S. at 451. The Court rejected this claim, holding that such adverse effects did not constitute a burden on religious exercise "heavy enough" to trigger strict scrutiny. *Id.* at 447. The burden was not cognizable, according to the Court, because the project did not "coerce[ ] [the tribes] into violating their religious beliefs; nor would [it] penalize religious activity." *Id.* at 449. The Court explained that its cases "do[ ] not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to *coerce* individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-451 (emphasis added). Just so here.

2. To be sure, this case involves RFRA, while *Lyng* dealt with the Free Exercise Clause. But as every circuit to consider the question has agreed, Congress enacted RFRA to codify this Court's pre-1990 Free Exercise jurisprudence, including *Lyng*.

a. RFRA was enacted in response to this Court's decision in *Smith*, which held that neutral, generally applicable laws are not subject to strict scrutiny even if they burden religion. *See Smith*, 494 U.S. at 878-879. Congress announced in RFRA that "the compelling interest test *as set forth in prior Federal court rulings* is a workable test for striking sensible balances" between religion and government. 42 U.S.C. §§ 2000bb(a)(4), (a)(5) (emphasis added). Indeed, the statute's stated purpose is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin*

v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1).

The federal courts have concluded, apparently without exception, that Congress intended courts to look to pre-*Smith* Free Exercise case law in construing the term "substantial burden." *See, e.g.*, Pet. App. 23a n.13 (Ninth Circuit *en banc*, holding that "Congress expressly instructed the courts" on this point); *Village of Bensenville* v. *FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006) ("RFRA was not meant to 'expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.' ") (quoting S. Rep. No. 103-111, at 12); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996), *vacated on other grounds sub. nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997) (explaining as part of a substantial-burden analysis that RFRA's purpose was to "restore pre-*Smith* free exercise case law").[4] That pre-*Smith* case law, dating to 1963 and culminating in *Lyng*, forecloses petitioners' claim.

b. The relevant authority begins with *Sherbert*, where this Court held that the Free Exercise Clause barred a state from denying unemployment benefits to a claimant who refused a job that required her, in violation of her religious beliefs, to work on

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[4] *Accord Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 662 (10th Cir. 2006) (*Lyng*'s substantial burden definition is "controlling" for RFRA purposes); *Adams* v. *Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999); *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995).

Saturday. The Court explained: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406. Nine years later, in *Yoder*, the Court struck down a law that required Amish parents to send their children to school in violation of their religion. The Court concluded that the law "unduly burden[ed]" the parents' religious exercise because it "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds" with their beliefs. 406 U.S. at 218, 220.

The Court subsequently elaborated on *Sherbert* and *Yoder*. In *Thomas*, the Court explained that *Sherbert* and its progeny targeted governmental regulations or actions with a "coercive impact" on religious exercise. *Thomas*, 450 U.S. at 717. The Court held: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 717-718. And in *Bowen* v. *Roy*, 476 U.S. 693 (1986), the Court relied on *Sherbert* to reject the claim that the government could not assign a Social Security number to a Native American girl because to do so would violate her father's beliefs. The *Bowen* Court explained that the father's objection was not that the government action "places any restriction on what he may believe or what he may do," but instead that "he believes the

use of the number may harm his daughter's spirit." 476 U.S. at 699. The Court flatly rejected the viability of such a claim: "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 699-700.

All of these cases led to the Court's holding in *Lyng*. *Lyng* addressed tribal challenges to a government road-building plan in a national forest. 485 U.S. at 442. The record revealed that the area around the road site was an "indispensable part of Indian religious conceptualization and practice," that "[s]pecific sites [we]re used for certain rituals," and that "successful use of the [area] is dependent upon * * * an undisturbed natural setting." *Id.* (citations omitted). The tribes had alleged, and the courts below had found, that construction of the road would "virtually destroy the * * * Indians' ability to practice their religion." *Id.* at 451.

Accepting that allegation as true, this Court nevertheless rejected the notion that the tribes' religious exercise had been burdened in any relevant way. *Id.* at 447. The Court explained that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*." *Id.* at 449. "In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the Court observed. "In neither case, however, would the affected individuals be coerced by the Government's action into violating their

religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.*

The *Lyng* Court distinguished the type of claim the tribes were making from the claims made by the successful petitioners in *Sherbert* and *Yoder*. Those cases, the Court explained, involved "coercion or penalties on the free exercise of religion" that were no less coercive just because they were "indirect." *Id.* at 450. The tribes' claim, by contrast, involved "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* Such incidental effects are not the sorts of burdens that "require government to bring forward a compelling justification for its otherwise lawful actions." *Id.*

3. There is no daylight between *Lyng* and this case. The tribes here, like those in *Lyng*, submitted evidence that the Peaks are "of central importance" to their religions, that they collect items from the Peaks for rituals, and that the snowmaking project would have a "large negative impact" on the "focus" required for ceremonies. Pet. App. 237a, 234a, 229a; *compare Lyng*, 485 U.S. at 442, 451 (government property in question was an "indispensable part of Indian religious conceptualization and practice," "[s]pecific sites [we]re used for certain rituals," and the proposed government land-use project could "virtually destroy" the tribes' ability to practice their religion). But as the District Court found, the snowmaking project would have no coercive effect on

the tribes' religious conduct. Pet. App. 259a-261a. In the words of *Bowen*, the Snowbowl project would not "place[ ] any restriction on what [the tribes] may believe or what [they] may do." 476 U.S. at 699. In the absence of such a restriction, there is no "substantial burden" under this Court's teachings.

4. Petitioners resist the conclusion that *Lyng* and its predecessors control this case, but their arguments are meritless. First, they assert that the Ninth Circuit erred by reading RFRA's "substantial burden" verbiage against the backdrop of the Free Exercise jurisprudence discussed above; the better course, according to petitioners, would have been to ignore that jurisprudence and consult a dictionary. Pet. 24-26. But every circuit to have addressed the question has concluded that the term "substantial burden" in RFRA should be construed in light of this Court's pre-1990 cases. *See supra* at 14.[5]

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[5] Petitioners' contention on this point also contradicts other portions of their argument. They and their *amici* say RFRA "uses the 'same' substantial burden standard" as the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Pet. 14 (citation omitted); *see also* Friends Committee Br. 7. But there is no question that RLUIPA's substantial burden standard is drawn from pre-*Smith* jurisprudence. *See, e.g.*, *Klem*, 497 F.3d at 278 (concluding that Congress did not intend in RLUIPA "to create a new standard for the definition of 'substantial burden'" but instead intended that the term "should be interpreted by reference to Supreme Court jurisprudence") (quoting 146 Cong. Rec. S7774, 7776 (July 27, 2000) (quotation marks omitted); *id.* (observing that, in line with this congressional directive, "several courts of appeals have looked to [the pre-*Smith* cases] to interpret what the phrase [substantial burden] means for RLUIPA purposes").

Petitioners also contend that the Ninth Circuit erred by construing "substantial burden" to mean "the types of burdens imposed in *Sherbert* and *Yoder*"—namely, coercion or penalty. Pet. 25-26. But it was *this Court*, long before the Ninth Circuit, that repeatedly explained that coercion and penalty (or "compulsion" and "restriction," in the words of *Bowen*) are the hallmarks of a cognizable burden on religious exercise. *See Bowen*, 476 U.S. at 699-700; *Lyng*, 485 U.S. at 449; *Thomas*, 450 U.S. at 717-718. The Ninth Circuit can hardly be taken to task for following that explicit guidance.

Petitioners next argue that not all of the pre-*Smith* cases used the term "substantial burden"—some only used the word "burden"—and therefore they must not provide content to the former term under RFRA. Pet. 26. Again, this argument runs into a wall of unanimous circuit precedent, all construing RFRA's "substantial burden" standard in light of the panoply of pre-*Smith* cases. *See supra at* 13-14. It likewise ignores the fact that in the years before RFRA was enacted, this Court described the cases discussed above as "substantial burden" cases. *See Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (using the phrase "substantial burden" and citing *Thomas* and *Yoder*). *See also Ford* v. *McGinnis*, 352 F.3d 582, 591 (2d Cir. 2003) ("The notion that a plaintiff must establish a substantial burden on his religious exercise to claim constitutional protection is derived from * * * *Sherbert* v. *Verner*.").

Petitioners also place great emphasis on the notion that this Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), "recognized that Congress intended RFRA to apply" to autopsies of religious believers,

zoning regulations, and other government "actions [that] do not force anyone to act in a certain way." Pet. 25; *see also* Pet. 2-3. *City of Boerne* "recognized" no such thing. The cited passage recounts Congressional testimony from non-legislators; its import is to point out that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530. Petitioners' invocation of this passage out of context, and their suggestion that this Court "recognized" RFRA's application in such circumstances, attributes to this Court a finding it did not make.

Petitioners, in short, are faced with (i) adverse and squarely applicable Supreme Court precedent on the meaning of "substantial burden," and (ii) unanimity among the circuits that that precedent informs the meaning of "substantial burden" under RFRA. There is nothing for this Court to decide.

II. THE CIRCUITS ARE NOT DIVIDED ON THE DEFINITION OF "SUBSTANTIAL BURDEN."

According to petitioners, however, there are circuit splits *everywhere* on this issue: Petitioners posit an "entrenched" circuit split on the meaning of "substantial burden," with the "deeply fractured" circuits "split broadly into three groups, [and] variations existing even within these categories." Pet. 12. In petitioners' view, just about every federal court of appeals has arrived at its own unique "substantial burden" test.

The very expansiveness of this claim underscores its flaws. For what petitioners see as multiple

"circuit splits" are in fact mere differences in wording among the circuits—every one of which defines "substantial burden" with reference to *Sherbert*, *Thomas*, and their progeny. *See infra* at 22-29; *see also Klem*, 497 F.3d at 279 (courts "have adopted some form of the *Sherbert/Thomas* formulation, but have often reworded their holdings"). The courts of appeals themselves recognize as much, with at least two expressing doubt that the semantic differences "come to [any]thing in practice." *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated on other grounds sub. nom. O'Leary* v. *Mack*, 522 U.S. 801 (1997) (remanding in light of *City of Boerne*); *Klem*, 497 F.3d at 279.

Quite right. As an initial matter, the dicta are not even inconsistent: While petitioners recite each circuit's formulation and observe that the words differ, every circuit finds a "substantial burden" only when government coerces a believer to engage in or forgo religious exercise. That is the test the Supreme Court has articulated for 45 years, and it is the test the Ninth Circuit employed in this case.

The congruence among the circuits is on full display when one reviews the cases' actual holdings—something petitioners largely refrain from doing. An examination of dozens of decisions from the other circuits, including every case cited by petitioners, reveals that not one has found a substantial burden absent coercion or penalty (which after all is just a form of coercion) of an adherent's conduct. *See infra* at 29-31. That was the line the Court drew in *Sherbert*, *Yoder*, *Thomas*, *Bowen*, and *Lyng*, and it is a line that has held ever since. The circuit split petitioners hypothesize does not exist.

A. The Circuits' "Substantial Burden" Formulations Are Easily Reconciled.

1. The Ninth Circuit below held that a substantial burden is imposed only when "government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs." Pet. App. 7a. The formulations adopted by the Fourth and D.C. Circuits are almost verbatim, as petitioners concede (at Pet. 13). *See Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 172-173 (4th Cir. 1995); *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). All three of these circuits' tests draw heavily on this Court's decision in *Thomas*, which explained that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon religion exists." 450 U.S. at 717-718. *See* Pet. App. 19a (quoting the above passage from *Thomas*); *Goodall*, 60 F.3d at 172 (same); *Henderson*, 253 F.3d at 16 (citing *Goodall* for the same proposition). And none can be met absent a governmental attempt to coerce an adherent's actions. *See* Pet. App. 20a (requiring that adherents be "forced to choose" between religious conduct and a governmental benefit or "coerced to act"); *Goodall*, 60 F.3d at 172-173 (requiring that adherents be "compelled to engage in conduct" or "forced to abstain from * * * action"); *Henderson*, 253 F.3d at 16 (requiring that adherents be forced "to engage in conduct" or prevented "from engaging in conduct").

Under none of these tests could petitioners—whose religious expression and acts are not coerced in any way by the decision to make artificial snow at the Snowbowl, *see* Pet. App. 259a-260a—show a substantial burden on their religious exercise.

2. Petitioners maintain that the Fifth, Third, and Eleventh Circuits "have adopted an[ ] intermediate approach" different from those described above. Pet. 17. But all three circuits' tests line up with the Ninth Circuit's formulation—and under none of them could petitioners state a claim.

In *Adkins* v. *Kaspar*, 393 F.3d 559 (5th Cir. 2004), the Fifth Circuit case cited by petitioners, the court reviewed *Sherbert*, *Thomas*, and *Lyng* to determine the contours of the "substantial burden" test. *Id.* at 569-570. The court held:

> [G]overnment action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. [*Id.* at 570 (citing *Sherbert* and *Thomas*)].

Petitioners quote the first sentence from *Adkins* above, Pet. 17, but they omit the second—a sentence nearly identical to the Ninth Circuit's test (*compare*

Pet. App. 20a) and drawn from the same Supreme Court cases. And while petitioners suggest that the "truly pressures the adherent" language of *Adkins* is at odds with the Ninth Circuit's test, *see* Pet. 17-18, that is incorrect. The "truly pressures" language comes straight from *Thomas*, which explained that government "pressures" adherents *precisely by coercing or penalizing their religious actions. See supra* at 15 (quoting *Thomas*, 450 U.S. at 717-718). The Fifth Circuit's "substantial burden" test, in short, has substantially similar language, and the same provenance, as the Ninth's.

The same analysis applies to the Third and Eleventh Circuits. In *Klem*, the Third Circuit held that "the Fifth Circuit in *Adkins* enunciated the proper standard for what constitutes a substantial burden." 497 F.3d at 280 n.7. The *Klem* court articulated that standard as follows: "[A] substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits * * * versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Id.* at 280. This formulation—like all of those discussed above—is drawn from *Sherbert* and *Thomas* and cannot be met without governmental coercion ("substantial pressure" to violate beliefs; "forced" to forfeit a benefit) of an adherent's actions.

Likewise, the Eleventh Circuit has defined substantial burden as "significant pressure which directly *coerces* the religious adherent to conform his or her behavior" and has said it "can result from

pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (emphasis added). This formulation, too, is drawn in large part from *Thomas* and its progeny, *see id.* at 1226-27, and cannot be met absent governmental coercion.[6]

3. Petitioners assert that the Eighth and Tenth Circuits "have adopted a much broader conception of 'substantial burden' " than the Ninth Circuit, Pet. 13, but they make no attempt to explain why those circuits' language is "much broader." In fact it is not.

As petitioners note, Pet. 14, the Eighth and Tenth Circuits' formulations originate with *Werner* v. *McCotter*, 49 F.3d 1476 (10th Cir. 1995). The *Werner* plaintiff, a prisoner, argued that the state had restrained his religious conduct in three ways: It had denied him access to a sweat lodge, had prohibited him from possessing a medicine bag, and had refused to allow him access to a spiritual adviser or to religious literature. 49 F.3d at 1478. The court surveyed Supreme Court case law—including *Thomas* and *Yoder*—as well as other prisoner-rights cases, and held:

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[6] Petitioners argue that "the Eleventh Circuit believes that this Court's pre-*Smith* decisions do not offer definitive guidance on the subject [of substantial burden] because '[t]he Court's articulation of what constitutes a substantial burden has varied over time.' " Pet. 19 (quoting *Midrash*, 366 F.3d at 1226). The Eleventh Circuit "believes" no such thing. *Midrash* stated that "[t]he Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive" in defining "substantial burden," and it then quoted *Thomas*, *Sherbert*, *Bowen*, and *Lyng*. *Midrash*, 366 F.3d at 1226-27.

> *Constraints upon religious conduct* will not fall within [RFRA] unless a "substantial burden" is placed upon a prisoner's capacity to exercise or express his or her sincerely held beliefs or faith. To exceed the "substantial burden" threshold, government regulation must significantly *inhibit or constrain conduct or expression* * * *, must meaningfully *curtail* a prisoner's ability to express adherence to his or her faith; or must *deny* a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion. [*Werner*, 49 F.3d at 1480 (emphases added; citations omitted)].

This formulation is consistent with those discussed above. Once again, the court's focus is on governmental attempts to coerce adherents to forgo religious actions: The government must "constrain" or "deny" an adherent's "conduct" or "activities" or "expression," else no cognizable burden is present. And while the *Werner* court spoke in terms of constraint and denial rather than coercion or penalty, that is hardly surprising. The context was a prisoner case. The government need not penalize prisoners for engaging in religious conduct when it can simply prohibit that conduct altogether. A flat-out ban is coercion writ large—and of course any attempt by a prisoner to resist such a ban no doubt would result in a coercive penalty.[7]

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[7] This point answers *amici*'s concerns regarding prisoners' rights. *See, e.g.* Friends Committee Br. 12. The Ninth Circuit's test, fairly read, allows for a "substantial burden" finding when prison officials bar prisoners from engaging in protected religious conduct.

That the *Werner* test does not differ from the decision below in any material way is confirmed by three observations about post-*Werner* case law. First, the Tenth Circuit twice has stated that *Lyng* is "controlling" as to "the definition of substantial burden." *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661-662 (10th Cir. 2006); *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Second, recent case law from these circuits has quoted *Werner* alongside the coercion/penalty formulation, again suggesting the courts see no material difference between the two. *See, e.g.*, *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 832 (8th Cir. 2009) (quoting *Werner* standard, immediately followed by *Thomas*).

Finally, and most importantly, the *Werner* formulation has never produced, in either the Eighth or Tenth Circuit, a "substantial burden" decision that would have come out differently in the Ninth Circuit—the hallmark of a circuit split. *See Stern & Gressman* at 242 ("genuine conflict" arises when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). In the 14 years since *Werner*, those circuits four times have found a substantial burden on religious exercise. *See Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004); *Kikumura* v. *Hurley*, 242 F.3d 950 (10th Cir. 2001); *Malik* v. *Kindt*, 107 F.3d 21 (10th Cir. 1997) (table disposition); *In re Young*, 82 F.3d 1407. All four cases involved the actual governmental prevention of religious conduct—worship in *Malik* and *Murphy*, pastoral visits in *Kikumura*, and tithing in *In re Young*. Neither circuit has found a "substantial burden" in a situation, like that presented here,

where the government did not coerce an adherent to forgo religious conduct.

Petitioners make only a cursory attempt to differentiate the *Werner* test from other circuits: They note that in adopting *Werner* for Eighth Circuit use, the *In re Young* court deemed it not "relevant" that the religious practice at issue "can continue"—a statement petitioners say is at odds with the Ninth Circuit's holding. Pet. 14 (quoting *In re Young*, 82 F.3d at 1418 and citing Pet. App. 6a & 20a); *see also* Br. of *Amici Curiae* Religious Liberty Law Scholars 8. This argument is quite mistaken. The cited passage from *In re Young* merely observed that a governmental constraint on religious conduct—forbidding debtors from tithing to their church—was no less of a "substantial burden" just because on some future date the government might lift the constraint and permit the debtors to resume tithing. *See* 82 F.3d at 1418. That conclusion is in perfect harmony with the Ninth Circuit's decision, which found no substantial burden because government placed no constraint on religious conduct in the first place. *See* Pet. App. 20a-21a.

4. Finally, as for the Seventh Circuit, petitioners rely on *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), but they yet again make little attempt[8] to explain why

[8] Petitioners contend that the *CLUB* decision "asserted * * * that the Eighth and Tenth Circuits' construction of 'substantial burden' 'cannot be correct.'" Pet. 16 (quoting *CLUB*, 342 F.3d at 761). But the Seventh Circuit was not referring to RFRA at all; it was explaining that the Eighth and Tenth Circuits' test "cannot be correct" *for purposes of RLUIPA*, which the *CLUB* court thought necessitated a different "substantial burden" test than RFRA. *See CLUB*, 342 F.3d at 761.

they think the case's substantial burden formulation—that a regulation must "bear[ ] direct * * * responsibility for rendering religious exercise * * * effectively impracticable," 342 F.3d at 761—is at odds with the Ninth Circuit's formulation below. *See* Pet. 16. Indeed, petitioners admit that the "precise bounds" of the *CLUB* test "are unclear." Pet. 16 n.6. And the Seventh Circuit itself has said (i) that *CLUB*'s "effectively impracticable" verbiage should be defined with reference to *Thomas*' "pressure" test, *see Koger* v. *Bryan*, 523 F.3d 789, 799 (7th Cir. 2008), and (ii) that the *CLUB* test is "similar[ ]" to *Thomas*' formulation. *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006). *Thomas*, of course, provides the basis for the "substantial burden" formulations of most every circuit. *See supra* at 22-28; *see also Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (stating that *CLUB*, *Adkins*, and *Midrash* all "[f]ollow[ ] th[e] model" provided in *Thomas* and are all "generally consistent" with one another). Given the Seventh Circuit's understanding of its own test, petitioners can hardly claim that *CLUB* and the decision below are at odds.

B. Courts Do Not Find A "Substantial Burden" Absent Coercion.

1. For all of the above reasons, petitioners have failed to demonstrate that the "minor variations" in the circuits' substantial burden frameworks, *Klem*, 497 F.3d at 279, render them inconsistent. Much less can petitioners demonstrate that these minor variations are outcome-determinative. We have already addressed this point with respect to the Eighth and Tenth Circuits, *see supra* at 27-28, and

the point holds with respect to every other circuit court whose precedent petitioners claim "conflicts" with the Ninth Circuit's governing rule: No case that we are aware of in *any* of those circuits has found a "substantial burden" absent governmental coercion of an adherent's religious conduct.

Take, for a starter set, the cases on which petitioners rely. The courts in *Goodall* (4th Cir.), *Adkins* (5th Cir.), *CLUB* (7th Cir.), *Henderson* (D.C. Cir.), *Weir* v. *Nix*, 114 F.3d 817 (8th Cir. 1997) (cited at Pet. 14), *Patel* v. *U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) (cited at Pet. 15), and *Midrash* (11th Cir.) did not find substantial burdens on religious exercise. And the cases cited in the petition where the courts *did* find a substantial burden all involved governmental coercion that forced an adherent to forgo religious conduct. *See Klem*, 497 F.3d at 281-282 (government forbade plaintiff to read religious texts); *Werner*, 49 F.3d at 1478-79 (government forbade plaintiff access to a sweat lodge and a medicine bag); *In re Young*, 82 F.3d at 1418 (government blocked plaintiffs from tithing); *Longoria* v. *Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (cited at Pet. 17) (government forbade adherent from growing his hair); *Murphy*, 372 F.3d at 988 (government forbade adherent from worshipping with like-minded believers).

The same is true of other cases not cited by petitioners. We have found no decision from any of the Ninth Circuit's sister courts that finds a "substantial burden" under RFRA absent the sorts of governmental coercion of religious conduct discussed above. *See, e.g.*, *Diaz* v. *Collins*, 114 F.3d 69, 73 (5th Cir. 1997) (substantial burden where prisoner was

forbidden to grow his hair long, as required by his religion); *Jolly* v. *Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (substantial burden where prisoner was confined to his cell for refusing a medical test that violated his religious beliefs).

2. Unable to point to an appellate case that actually finds a substantial burden on facts anything like those presented here, petitioners are left to rely on an unpublished, mooted district court decision for the proposition that they could succeed under some court's "substantial burden" formulation. Pet. 15-16 (citing *Comanche Nation* v. *United States*, N. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008)). It is not at all clear even that *that* case supports their argument;[9] but the fact that it is the lone case to which they point speaks volumes about whether they have identified a "genuine conflict" among the circuits. *Stern & Gressman* at 242.

Petitioners' only other attempt to show that their "split" has led to divergent outcomes is by way of *ipse dixit*: They assert that they "would prevail" in the Eighth and Tenth Circuits and "might also prevail" in the Seventh, Third, Fifth, and "possibly even Eleventh" Circuits. Pet. 20-21. The short answer is that fifteen years of reported cases say otherwise.[10]

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[9] *Comanche Nation* involved tribe members' allegations that a governmental action would physically deny them access to a sacred site necessary for their religious exercise. *See* 2008 WL 4426621, at *3, *7, *17. The District Court here, in contrast, found that the petitioner tribes were not denied access to any sacred sites—or for that matter to any land on which the Snowbowl sits. *See* Pet App. 14a, 259a-261a.

[10] *Amici* law professors speculate that the Ninth Circuit's "substantial burden" formulation might lead to unwelcome

III. PETITIONERS' RULE WOULD HAVE SEVERE REPERCUSSIONS FOR FEDERAL PROGRAM MANAGEMENT.

Petitioners argue that their so-called circuit split "is bound to cause operational difficulties within federal agencies." Pet. 23. Not so. Quite the opposite, in fact; courts—including this Court—uniformly have recognized that it is *petitioners'* proposed rule of decision that would wreak havoc on federal program management. As the Ninth Circuit majority explained, petitioners' preferred rule would leave "any action the federal government were to take, including action on its own land, * * * subject to the personalized oversight of millions of citizens," with each holding "an individual veto to prohibit the government action"—or at least force it to meet strict scrutiny—"solely because it offends his religious beliefs." Pet. App. 7a. Petitioners' rule, in short, would impose a "religious servitude" on government lands and government agencies. *Lyng*, 485 U.S. at 452. As this Court wrote in *Lyng*:

> [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs

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decisions in various other circumstances, including government-mandated autopsies of religious adherents. *See* Br. of *Amici Curiae* Religious Liberty Law Scholars 9-17. As an initial matter, such circumstances may well constitute the requisite coercion, depending on the factual setting. And the law professors' concerns are largely hypothetical in any event; the forced-autopsy issue, for example, has not produced even *one* RFRA decision in the courts of appeals, much less multiple conflicting decisions. As to the law professors' concerns about zoning, *see id.* at 14, RLUIPA provides additional protection for religious land use, including zoning decisions affecting churches. *See* 42 U.S.C. § 2000cc(b); *id.* § 2000cc-5(5).

> and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered * * * deeply offensive [to some citizens], and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment * * * can give to none of them a veto over public programs that do not prohibit the free exercise of religion. [485 U.S. at 452].

The evidence in this case illustrates how broad petitioners' proposed "veto" really is. According to petitioners, any snowmaking, even with fresh water, harms their religious beliefs. Pet. App. 225a, 249a. Indeed, any alteration to sacred land at all, no matter how localized, undermines those beliefs. *See, e.g.*, ER212-213 ("[T]he Peaks are like a single living entity" such that "you can't hurt or harm or destroy a piece * * * without it affecting the whole"). According to petitioners, then, most any government land-management decision that touches on sacred land could trigger strict scrutiny. That is a daunting proposition, given that "[m]illions of acres of public land" nationwide—including the entire Colorado River and Grand Canyon—are held sacred by Indian tribes. Pet. App. 244a-245a, SER1954. In the Southwest alone, there are at least 40 to 50 sacred mountains and 40,000 to 50,000 sacred sites, and "new sacred areas are continuously being created." Pet. App. 243a-245a. *See also* NCAI Br. 5 (stating that "tribal aboriginal territories are much larger than reservation boundaries and Indian tribes generally have concerns about the management of sacred land * * * throughout their aboriginal territories"). And the economic and recreational

activities conducted on these lands are extensive. The Peaks alone—one federal property among thousands—are home to timber harvesting, cattle grazing, camping, hiking, communications towers, a nature conservancy, gas and electric transmission lines, and much more. Pet. App. 217a-218a.

Petitioners' proposed rule, in short, would allow tribes to impose long and costly delays on, and in some cases a veto over,[11] federal land management projects of every stripe. *See Snoqualmie Indian Tribe* v. *FERC*, 545 F.3d 1207 (9th Cir. 2008) (applying standard adopted below to reject tribal claim that important hydroelectric power generator burdened religion and should be shut down). This Court recognized as much in *Lyng* and rejected precisely the rule of decision petitioners now advance. *Lyng*'s logic is fatal to petitioners' policy argument—and to the notion that this case warrants certiorari review.

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[11] It is no answer to say that some of these projects might survive strict scrutiny. Petitioners' preferred strict-scrutiny regime would be triggered upon an allegation that one's internal belief system was impinged, meaning that in virtually every case, after satisfaction of that diaphanous threshold, the government would be put to its proof of a "compelling interest." That burden in turn may prove exceedingly difficult to surmount on an individualized basis; the government may not be able to demonstrate a compelling interest in, for example, pursuing a particular water-management project at a particular site. Petitioners' low strict-scrutiny threshold thus may effectively block the government from implementing any land management plans.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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